In the Supreme Court

OF THE

United States

OCTOBER TERM, 1971

No. 732
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MERLE R. SCHNECKLOTH, Superintendent,
California Conservation Center, *Petitioner,*

vs.

ROBERT CLYDE BUSTAMONTE, *Respondent.*

**On Writ of Certiorari to the
United States Court of Appeals for the Ninth Circuit**

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is printed in the appendix at pages 6 through 10 and reported at 448 F.2d 699; the memorandum opinion and order of the United States District Court for the Northern District of California is unreported and is printed in the appendix at pages 11 and 12.

JURISDICTION

The judgment of the court of appeals was entered September 13, 1971. The petition for writ of certiorari was docketed in this Court on December 3, 1971 and granted February 28, 1972. The jurisdiction of this Court is conferred by Title 28, United States Code section 1254(1).

QUESTIONS PRESENTED

1. Whether the court of appeals erred in holding invalid the search of an automobile based upon a verbal expression of consent to search in an atmosphere free from coercion, on the sole ground that the state failed to demonstrate that the consent was given with knowledge that it could be withheld.

2. Whether claims relating to search and seizure should be available to a state prisoner seeking to set aside his final conviction on federal habeas corpus.

STATEMENT OF THE CASE

A. Proceedings in the state court.

Robert Clyde Bustamonte, respondent herein, was convicted by a jury of possession of a completed check with intent to defraud in violation of California Penal Code section 475(a). A state prison sentence of from one to fourteen years was imposed. On appeal to the California Court of Appeal for the First Appellate District, Bustamonte's conviction was affirmed in an opinion set fourth in the appendix at pages 13

through 25, and reported at 270 Cal.App.2d 648, 76 Cal.Rptr. 17 (1969). Bustamonte's petition to the California Supreme Court for a hearing was denied May 8, 1969.

B. Proceedings in the federal courts.

On May 23, 1969, Bustamonte petitioned the United States District Court for the Northern District of California for a writ of habeas corpus. The petition was filed on February 10, 1970; on that date the district court also filed an order granting Bustamonte's motion to file in forma pauperis and denying the petition. This order is printed in the appendix at pages 11 and 12.

Bustamonte filed a notice of appeal to the United States Court of Appeals for the Ninth Circuit on March 9, 1970; on that date the district court granted a certificate of probable cause and permitted Bustamonte to proceed without prepayment of cost.

On September 13, 1971, the court of appeals filed its opinion vacating the order of the district court denying the writ and remanded the matter to the district court for further proceedings. Appendix pp. 6 through 10.

C. Statement of the facts.

The facts of this case are stated in the opinion of the California Court of Appeal in *People v. Bustamonte, supra,* as follows:

> "On the morning of January 19, 1967, Charles Kehoe, owner of the Speedway Car Wash in Mountain View, discovered that the business office

had been burglarized some time since he had closed on the previous day. A check-writing machine, known as a check protector, and a number of blank checks had been removed from the office.

"On January 21, 1967, Joe Gonzales and Joe Alcala went with defendant to the Food Fair Market in Mountain View. According to the testimony of Gonzales, defendant filled out a check while they were in the parking lot. This check was a Speedway Car Wash check 'protectorized' in the amount of $63.75 and defendant made it out to a 'Joe Garcia' and signed it with Kehoe's name. Gonzales took the check into the market where he cashed it in the process of buying a carton of cigarettes. Kehoe identified the check payable to Garcia and stated the signature was not his. After cashing the check on January 21, defendant, Gonzales and Alcala went to defendant's home. Gonzales saw defendant and Alcala lean over the open trunk of defendant's parked Oldsmobile automobile and then the two returned to the truck where Gonzales was waiting, bringing with them two additional Speedway Car Wash blank checks. The amounts of money were filled in on the checks but no names or signatures were entered. The men next unsuccessfully attempted to cash another check at the Blue Bonnett Bar in Sunnyvale.

"Gonzales testified that at some time before the incidents of January 21 defendant had shown him the check protector and some blank checks which were contained in the trunk of a Camero automobile which had been rented by defendant.

"On January 31, 1967, defendant Alcala and Gonzales went to San Jose to find persons willing

to use false identification for the purpose of cashing checks. At about 11 p.m. they picked up three other men. Attempts to cash checks at grocery stores and a bar were futile. During the evening they stopped at the Moonlite Shopping Center where Gonzales saw defendant take some checks from defendant's Renault automobile which was in the parking lot.

"Police Officer James Rand of the Sunnyvale Department of Public Safety was in a police vehicle alone on routine patrol at approximately 2:40 a.m. on January 31, 1967. He observed an oncoming vehicle which had only one functioning headlight. Rand made a U-turn and also observed that the automobile in question did not have an automobile license plate light. He stopped the automobile which was a black 1958 Ford 4-door sedan. Six men were in the automobile at the time it was stopped, and Rand testified that defendant was in the front seat along with Alcala, and that Gonzales was driving. After Gonzales failed to produce a driver's license, Officer Rand asked if any of the occupants of the Ford had identification. Only Alcala produced a driver's license and he indicated that the automobile belonged to his brother. Officer Rand asked the occupants to step out of the automobile. After the men were out of the car and after Officer Rand was joined by Officer Bissell and Captain Crabtree, he asked Alcala if he could search the car. According to Officer Rand's testimony, Alcala replied 'Sure, go ahead.' Gonzales also testified that Alcala had given permission for the search and had actually aided the officer. Officer Rand and Captain Crabtree searched the Ford. Wadded up under the left rear seat they found three

checks. Each of the checks was 'protectorized' in the amount of $67.34, each was signed with the name of Kehoe as maker, and each was a Speedway Car Wash check. One was payable to Robert Gomez and two were payable to Jino Anthony.

"Later, pursuant to a search warrant, the Renault at the Moonlite Shopping Center and defendant's Oldsmobile in Sunnyvale were searched. Two checks were found in the Renault and the check protector and several blank checks were found in the Oldsmobile, along with a number of traffic citations naming defendant. A criminologist testified that in his opinion the writing on the Speedway Car Wash checks was the writing of defendant.

Search of the Ford

"At the time that Officer Rand and Captain Crabtree searched the Ford automobile and discovered the three completed checks, there was a total of three police officers and three police vehicles on the highway near the stopped automobile. The occupants were asked to step out of the car and at one point Gonzales was told to stand by the car; at another time Alcala was told to back away from the area of the search. Gonzales was also given a citation for the missing lights and for his failure to produce a driver's license. According to Gonzales' testimony, the police cars did not have the passengers hemmed in. No one was under arrest at the time of the search and none of the individuals had been advised as to any constitutional rights. After testimony was taken in chambers on the constitutionality of the search, the court ruled that there had been consent to the search and the motion of

defense counsel to suppress the evidence was denied." Appendix pp. 14-17.

SUMMARY OF ARGUMENT

The California trial and appellate courts found that Bustamonte's consent to search was voluntarily given. California evaluates consent searches under an objective standard; the Ninth Circuit has held this standard unconstitutional and substituted the requirement of a knowing waiver of Fourth Amendment rights. However, the California standard is constitutional, finding its counterpart in decisions of this Court. Since California's consent rule is a constitutionally acceptable standard, the federal courts are required to apply it in habeas corpus cases involving state prisoners. *Ker v. California,* 374 U.S. 23 (1963). If on the other hand, a waiver standard is constitutionally required, third party consent searches will become virtually impossible, and an admonition respecting Fourth Amendment rights may be made a prerequisite to the validity of a consent search. In the present case, judged by California's consent rule, there is no doubt that the consent given by Alcala was voluntary.

Alternatively, we urge that because the advantages of the exclusionary rule as a deterrent to unlawful police conduct are doubtful, as weighed against the real disadvantages to the states involved in subjecting final criminal judgments to collateral attack based on the exclusionary rule, this Court should hold that

such claims can no longer be asserted on federal habeas corpus. Recent decisions of this Court which guarantee procedural fairness, *i.e.*, the right to counsel, confrontation and the like, are sufficient to insure the integrity of state court procedure. On the other hand undermining the finality of state criminal judgments, by allowing the litigation and relitigation of complex and difficult Fourth Amendment claims having no relationship to guilt or innocence, serves no useful purpose and imposes an unnecessary burden upon the administration of justice.

ARGUMENT

I

THE FORD IN WHICH BUSTAMONTE WAS RIDING WAS SEARCHED PURSUANT TO A VALID CONSENT AND THE COURT OF APPEALS ERRED IN HOLDING OTHERWISE.

This case involves nothing less than the constitutionality of California's standard for determining the validity of consent searches. We ask this Court to reaffirm that "*Mapp* sounded no death knell for our federalism. . . ." *Ker v. California,* 374 U.S. 23, 31 (1963) (opinion of Mr. Justice Clark).

Ever since this state adopted the exclusionary rule in 1955 (see *People v. Cahan,* 44 Cal.2d 434, 282 P.2d 905 [1955]), California courts have evaluated consensual searches under the standard articulated by former Chief Justice Traynor in *People v. Michael,* 45 Cal.2d 751, 753, 290 P.2d 852, 854 (1955):

"Whether in a particular case an apparent consent was in fact voluntarily given or was in submission to an expressed or implied assertion of authority, is a question of fact to be determined in the light of all the circumstances." Accord, *Castenada v. Superior Court,* 59 Cal.2d 439, 30 Cal.Rptr. 1 (1963); *People v. Smith,* 63 Cal.2d 779, 48 Cal.Rptr. 382 (1966); *People v. Johnson,* 68 Cal.2d 629, 68 Cal.Rptr. 441 (1968).

California courts focus their inquiry on whether the consent was truly voluntary. The consenting party's knowledge and understanding of his Fourth Amendment rights are relevant to the extent that they evidence coercion or non-coercion, but his subjective knowledge and understanding of those rights is not determinative. See *People v. Wilson,* 145 Cal.App.2d 1, 301 P.2d 974 (1956), limited in *People v. Linke,* 265 Cal.App.2d 297, 71 Cal.Rptr. 371 (1968); *Comment,* 10 SANTA CLARA LAWYER 205, 211 (1969).

The theory underlying the California rule is this: The Fourth Amendment proscribes only unreasonable searches and seizures; when consent is uncoerced, law enforcement officers have acted reasonably within the meaning of the Fourth Amendment and the search is valid. *People v. Michael, supra,* 45 Cal.2d at 753, 290 P.2d at 854.

Thus, California courts, concentrating upon the conduct of the officer rather than on the subjective state of mind of the consenting party, hold that "an objective standard should be used in determining whether there has been a valid consent to search. . . ."

People v. Gurley, 23 Cal.App.3d 536, 555, 100 Cal. Rptr. 407, 420 (1972). This theory was articulated by one writer as follows:

> "It is elementary that the fourth amendment does not address itself to evidentiary questions but rather the right to be free from unreasonable intrusions.
>
> * * *
>
> "The very word 'unreasonable' could be the key word to this amendment as it suggests a test which is not only largely subjective but discretionary as well. As the amendment affords freedom from 'unreasonable' searches and seizures only, the only real question before a trial judge is the reasonableness of the search. Is it really unreasonable to search property where the owner does not object? It would appear that a search which does not degrade or in any other way affect the dignity of the person whose property is being searched would not be unreasonable. . . . Of course, if there is any evidence of coercion or misrepresentation by the police, the consent would not be valid."
>
> D. Owens, *Consent to Warrantless Search,* 3 JOHN MARSHALL JOURNAL OF PRACTICE AND PROCEDURE, 403, 419-420 (1970).

The Ninth Circuit has adopted an essentially different approach in evaluating the validity of a consent. That court focuses inquiry on the consenting party's subjective state of mind: Has he intentionally relinquished a known right or privilege? *Cipres v. United States,* 343 F.2d 95, 97-98 (9th Cir. 1965); *Schoepflin v. United States,* 391 F.2d 390 (9th Cir.

1968). This is the standard for waiver first announced in *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). Its effect is to require of police officers either clairvoyance or an unrealistic degree of psychological insight. See *Robbins v. MacKenzie,* 364 F.2d 45, 49 (1st Cir. 1966). The Ninth Circuit rule was criticized in *People v. Cirilli,* 265 Cal.App.2d 607; 71 Cal.Rptr. 604 (1968). "The reasonableness of a belief that consent has freely been given is the very matter at issue, but it is an objective reasonableness as viewed by the court, not the subjective opinion of the officer that it was reasonable to believe consent had been given." *Id.* at 611, 71 Cal.Rptr. at 607.

However, what is at issue here is not so much the intrinsic merits of the Ninth Circuit rule but rather, the power of that court to impose it upon the states as the sole valid ground for determining the validity of a consent search. "Federal authority was never intended to be a 'ramrod' to compel conformity to nonconstitutional standards." *California v. Green,* 399 U.S. 149, 172 (1970), concurring opinion of Chief Justice Burger. However, the Ninth Circuit has been "ramrodding" its rule upon the states by applying its subjective waiver test in habeas corpus cases involving state prisoners. See *e.g., Cunningham v. Heinze,* 352 F. 2d 1, 3 (9th Cir. 1965); *Oliver v. Amiotte,* 382 F.2d 987 (9th Cir. 1967); *Oliver v. Bowens,* 386 F.2d 688 (9th Cir. 1967); *cf., State of Montana v. Tomich,* 332 F.2d 987, 990 (9th Cir. 1964).

This approach is irreconcilable with the declaration of this Court in *Ker v. California, supra,* 374 U.S. 23,

24 (1963) that "the states are not precluded from developing workable rules governing arrests, searches and seizures."

A. California's consent rule is constitutional.

The California rule reflecting the voluntariness approach to consent searches was impliedly approved by this Court in *Bumper v. North Carolina,* 391 U.S. 543, 548-549 (1968):

> "When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority." See also Note, 6 Cal. Western L. Rev. 216 (1970).

California courts uniformly hold that whether an apparent consent to search was in fact voluntarily given or was in submission to asserted authority is a question of fact. *People v. Michael, supra; People v. Shelton,* 60 Cal.2d 740, 36 Cal.Rptr. 433 (1964); *People v. Gurley, supra,* 23 Cal.App.3d 536, 550, 100 Cal.Rptr. 407, 416-417 (1972). Consent is also viewed as a factual question by this Court. *United States v. Mitchell,* 322 U.S. 65 (1944); *Davis v. United States,* 328 U.S. 582 (1946).

Title 28, United States Code section 2254(d) declares that unless the State court hearing was unfair or defective in specified respects,

> "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment

> of a State court, a determination after a hearing on the merits of a *factual* issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State . . . were parties, evidenced by a written finding, written opinion, or other reliable and adequate written indicia, *shall be presumed to be correct.* . . ." (Emphasis supplied.)

After an in chambers hearing on Bustamonte's motion to suppress the state trial court made a factual finding that Alcala's consent was voluntary. Appendix p. 57. That determination was affirmed on appeal. Thus, Bustamonte received a full and fair hearing at the state trial and appellate levels in which the courts applied a constitutionally acceptable standard of law. Accordingly, the state court finding was entitled to the presumption of correctness afforded by Title 28, United States Code section 2254(d). Since, under *Bumper,* voluntariness is a constitutionally acceptable test and since Bustamonte's petition did not allege that the state court hearings were in any respect inadequate, apart from his claim that the state applied an erroneous legal standard, the claim of invalid consent should have been summarily rejected by the court of appeals as it was by the district court. *Procunier v. Atchley,* 400 U.S. 446, 454 (1971).

If, on the other hand, California's voluntariness standard is unconstitutional—and this is no less than what the Ninth Circuit held—and in its place a waiver standard is imposed, then serious consequences ensue which the Court will eventually have to face. It should face these consequences now instead of being con-

fronted in later cases with the dilemma of choosing to vindicate the waiver standard at the expense of settled principles heretofore felt to be wholly consistent with the Fourth Amendment. *Cf. Chimel v. California*, 395 U.S. 752, 769, (1969) (concurring opinion of Mr. Justice Harlan). For if the waiver standard is imposed, then this Court in addition to overruling or limiting *Bumper v. North Carolina, supra*, will have to overrule those cases which have approved third party consent searches, the apparent authority doctrine, and searches based on a reasonable mistake of fact. It will probably also have to impose a warning requirement akin to the *Miranda* rule.[1]

B. Third party consent searches.

A waiver approach would make valid third party consent searches virtually impossible. An excellent description of the current law on third party consent searches appears in *United States v. Martinez*, 450 F.2d 864 (8th Cir. 1971), wherein the court of appeals stated as follows:

> "Originally couched in terms of a distinct personal right of the subject of the search which could be waived only directly or through an agent, [footnote omitted] the consent exception as applied to third party consents has recently been focused on the third party. His legal and possessory rights to the premises or items searched, his relationship to the subject of the search and the

[1] *Miranda v. Arizona*, 384 U.S. 436 (1966). Ironically, it appears that *Miranda* itself is under reexamination. *Pennsylvania v. Ware*, No. 71-964, cert. granted March 14, 1972, 40 U.S.L. Week 3449.

> circumstances as they objectively appear to the police at the time of the search are all to be considered in determining whether the third party possessed an independent right to consent to a warrantless search by the police which will operate to foreclose subsequent attempts at suppression by the subject of the search." *Id.* at 865.

However, advocates of a strict waiver standard admit that it would curtail if not eliminate third party consent searches. Under a waiver standard searches pursuant to consent by a third party would be upheld only in those rare cases where the third party is actually an agent of the nonconsenting party and is empowered to authorize a search on the latter's behalf, or when the consenting party's interest in authorizing a particular search clearly dominate the nonconsenter's interest in privacy. Note, *Third Party Consent to Search and Seizure,* 33 U.CHI.L.REV. 797 (1966); Note, *Consent Searches, A Reappraisal After Miranda v. Arizona,* 67 COLUM. L. REV. 130, 149-150 (1967).

Ironically, at approximately the same time the Ninth Circuit was imposing upon California the waiver standard articulated in the *Cipres* and *Schoepflin* cases, *supra,* that court declined to apply it in federal prosecutions which used evidence obtained in third party consent searches. Thus, in *United States v. Wilson,* 447 F.2d 1 (9th Cir. 1971), the court characterized *Cipres* and *Schoepflin* as coercion cases and went on to hold that a person living in a common law relationship with the defendant had validly consented to a search of the apartment in which they were liv-

ing. The court decided the issue of voluntariness on all the circumstances of the case and did not require a showing of knowing waiver. 447 F.2d 4-6. Similarly, in *United States v. Novick* 450 F.2d 1111 (9th Cir. 1971), the court used the same objective standard approach.

A waiver approach to third party consent searches would be wholly inconsistent with the decisions of this Court. In *Coolidge v. New Hampshire,* 403 U.S. 443, where a wife handed over to investigating officers items of physical evidence which incriminated her husband, this Court applied an objective test, *i.e.,* were her actions voluntary, the product of her own free will, as opposed to a response to an assertion of official authority. *Coolidge v. New Hampshire, supra,* 403 U.S. 443, 445, 489 (1971). In *Frazier v. Cupp,* 394 U.S. 731 (1969), the Court applied the third party consent doctrine to hold that a defendant had assumed the risk that his companion would permit the police to search a shared duffle bag (394 U.S. at 740).

By way of contrast, in *Stoner v. California,* 376 U.S. 483 (1964), the Court found "[No] substance to the claim that the search was reasonable because the police, relying upon the night clerk's expressions of consent, had *a reasonable basis for belief* that the clerk had authority to consent to the search." *Id.* at 448. (Emphasis added.) Implicit in the *Stoner* opinion is the assumption that if the police reasonably believed that the consenting party had authority to consent, the search based upon consent would have been valid.

This would accord with *Hill v. California,* 401 U.S. 797 (1971), where the Court upheld the validity of an arrest based upon a reasonable mistake of fact on the part of the arresting officers.

C. Requirement of an admonition.

Implicit in the decision below imposing a waiver requirement is the necessity of a warning analogous to that decreed by this court in *Miranda v. Arizona,* 384 U.S. 436 (1966), although the Ninth Circuit did not go so far as to state that a specific admonition was required, and has specifically rejected that requirement in federal prosecutions. *United States v. Noa,* 443 F.2d 114, 147 (9th Cir. 1971). However, wherever a waiver standard has been imposed by the Court, the requirement of an admonition or independent evidence of a knowing waiver almost necessarily follows. See *e.g., Carnley v. Cochran,* 369 U.S. 506, 513 (1962); *Miranda v. Arizona, supra,* 384 U.S. 436, 469-473 (1966); *McCarthy v. United States,* 394 U.S. 459 (1969); *Boykin v. Alabama,* 395 U.S. 238, 243 (1969). Some writers, taking their cue from these cases and assuming that a consent search must be based on a waiver of Fourth Amendment rights, have urged that a warning is necessary before any effective consent. Note, *Consent Searches, A Reappraisal After Miranda v. Arizona, supra,* 67 COLUM. L. REV. 130 (1967) *supra*; Note, *Consent Searches—Relinquishment of Fourth Amendment Rights—The Need for a Warning,* 5 GONZAGA L. REV. 315 (1970); Note, *Consent Search: Waiver of Fourth Amendment Rights,* 12 ST. LOUIS U.L.J. (1968); *cf.* Owens, *supra.*

The overwhelming weight of the case law is to the contrary. California courts, the federal courts and courts of other jurisdictions have rejected any requirement that one whose consent is sought for a search must first be advised of his Fourth Amendment rights. *Blair v. Pitchess,* 5 Cal.3d 258, 275, fn. 8; *People v. Superior Court,* 71 Cal.2d 265, 270, fn. 7 (1969); *People v. Gurley,* 23 Cal.App.3d 536, 554-555, 100 Cal.Rptr. 407 (1972); *People v. Stark,* 275 Cal. App.2d 712, 714-715 (1969), 80 Cal.Rptr. 307, 308-309; *People v. Linke,* 265 Cal.App.2d 297, 314, 71 Cal.Rptr. 371 (1968); *People v. Campuzano,* 254 Cal.App.2d 52, 61 Cal.Rptr. 695 (1967); *People v. Roberts,* 246 Cal.App.2d 715, 55 Cal.Rptr. 62 (1966); *Gorman v. United States,* 380 F.2d 158, 164 (1st Cir. 1967); *United States ex rel. Cole v. Mancusi,* 429 F.2d 61, 66 (2d Cir. 1970); *United States ex rel. Harris v. Hendricks,* 423 F.2d 1096 (3d Cir. 1970); *Government of Virgin Islands v. Berne,* 412 F.2d 1055 (3d Cir. 1970); *United States v. Vickers,* 387 F.2d 703, 707 (4th Cir. 1967); *United States v. Goosbey,* 419 F.2d 818 (6th Cir. 1970); *Byrd v. Lane,* 398 F.2d 750, 754-755 (7th Cir. 1968); *United States v. Noa, supra* 443 F.2d 144 (9th Cir. 1971); *Leeper v. United States,* 446 F.2d 281 (10th Cir. 1971); *White v. United States,* 444 F.2d 724, 726 (10th Cir. 1971); *Phillips v. People,* 170 Colo. 520, 462 P.2d 594 (1969); *State v. Custer,* 251 So.2d 287 (Fla. App. 1971); *State v. Oldham,* 92 Id. 124, 438 P.2d 275 (1968); *State v. McCarty,* 199 Kans. 116, 427 P.2d 616 (1967); *Hohnke v. Commonwealth,* 451 S.W.2d 162 (Ky. Ct. App. 1970); *State v. Andrus,* 250 La. 765, 199 So.2d 867

(1967); *Morgan v. State,* 2 Md.App. 440, 234 A.2d 762 (1967); *State v. Forney,* 181 Nebr. 767, 150 N.W.2d 915 (1967); *State v. Douglas,* 488 P.2d 1366 (Ore. 1971); *Commonwealth v. Anderson,* 208 Pa. Super. 323, 222 A.2d 495 (1966); *State v. Leavitt,* 103 R.I. 273, 237 A.2d 309 (1968); *Weeks v. State,* 417 S.W.2d 716 (Tex. Crim. App. 1967); *State v. Johnson,* 71 Wash. 239, 427 P.2d 705 (1967).

Reason no less than the weight of authority compels rejection of a *Miranda* approach in the area of consensual searches. The original justification of the *Miranda* admonition was that in the context of custodial interrogation, the questions of the police were assumed themselves to impart a right to an answer. However, "the mere asking of permission to . . . make a search carries with it the implication that the person can withhold permission. . . ." *People v. Chaddock,* 249 Cal.App.2d 483, 485-86, 57 Cal.Rptr. 582 (1967).

Warnings required before *custodial* interrogation are intended to eliminate conditions conducive to coercion, "to sterilize the police antechamber." *In re Lopez,* 62 Cal.2d 368, 374, 42 Cal.Rptr. 188, 192 (1965), *cf. Miranda v. Arizona, supra,* at 478 n. 46. Consents to search generally are given at the suspect's residence, automobile, or some other public place. Where consent is obtained at police headquarters, the prosecution must satisfy a correspondingly heavier burden of proof. See, *e.g., Channel v. United States,* 285 F.2d 217 (9th Cir. 1960); *People v. Shelton,* 60 Cal.2d 740, 36 Cal.Rptr. 433 (1964). The state and

federal tests for consent are sufficiently sensitive to exclude evidence secured by coercive police conduct.

Coercion during police interrogation raises a danger of producing unreliable self-incriminating evidence. "[T]he rules governing searches are not concerned with the exclusion of unreliable evidence. . . ." *Gorman v. United States, supra,* at 164.

Proponents of the *Miranda* rule emphasize that it will improve police-citizen relationships because the admonition demonstrates to the citizen that the police stand ready to respect his constitutional rights. Police convey the same impression when they *request* consent to search. On the other hand, if a suspect withholds consent after police advice, officers will arrest and conduct an incidental search in cases where they believe probable cause exists. This is not calculated to improve police-citizen relationships.

"A principal objective of . . . [*Miranda*] was to establish safeguards that would liberate courts insofar as possible from the difficult and troublesome necessity of adjudicating in each case whether coercive influences, psychological or physical, had been employed to secure admissions and confession." *People v. Fioritto,* 68 Cal.2d 714, 717, 68 Cal.Rptr. 817, 818 (1968). The difficulty of resolving swearing contests between police and defendants prompted the search for a self-executing rule. See *Crooker v. California,* 357 U.S. 433, 443-44 (1958) (dissenting opinion of Mr. Justice Douglas).[2]

[2]The *Miranda* admonition also facilitates the determination of whether there has been an effective *waiver;* we urge that the waiver test is inapplicable to consent to search.

Proof that the suspect was admonished *together* with his subsequent statement, the existence of which independently evidences cooperation, renders it unnecessary for courts to prefer the testimony of the police to that of the defendant. The same is not true in the context of consensual searches. Conflicts in testimony now center on the precise words of the defendant relied upon by the police. Were a Fourth Amendment warning required the conflict would be about whether the admonition was given, the scope of the consent, and revocation of consent. The tangible evidence disclosed by the search, unlike an admission or confession, would be silent on these questions. There is no escape from the judicial dilemma posed by consensual searches or from the overwhelming body of authority rejecting any warning requirement.

Moreover, considerations of practicality compel rejection of a *Miranda* approach. Following the *Miranda* decision, one of the commentators who urged extension of that rule to consent searches (*See, Consent Searches: A Reappraisal After Miranda v. Arizona, supra*, 67 COLUM. L. REV. 130 [1967]), after considerable exploration of what an effective Fourth Amendment warning should convey at 150-158, set out a suggested warning.

> "You have a right to refuse to allow me to search your home, and if you decide to refuse, I will respect your refusal. If you do decide to let me search, you won't be able to change your mind later on, and during the search I'll be able to look in places and take things which I couldn't even if I could get a search warrant. You have

> a right to a lawyer before you decide, and if you can't afford a lawyer we will get you one and you won't have to pay for him. There are many different laws which are designed to protect you from my searching, but they are too complicated for me to explain or for you to understand, so if you think you would like to take advantage of this very important information, you will need a lawyer to help you before you tell me I can search." *Id.* at 158.

We submit that the very complexity of such a warning proves its unworkability, and the basic unsoundness of any theory that would require it.

D. Bustamonte's consent was truly voluntary.

In its opinion, the Ninth Circuit appears to concede that the atmosphere in which consent was given was noncoercive and that permission to search was requested and given. This view of the facts is correct.

When the police stopped the 1958 Ford, Gonzales was driving; appellant was seated in the front with Alcala; three men occupied the rear seat. Officer Rand requested the six occupants to step out of the automobile after Gonzales failed to produce a driver's license and only Alcala could furnish identification. Officer Rand asked Alcala if he could search the car. Alcala replied, "Sure, go ahead," according to Rand. Gonzales testified that Alcala consented freely, even casually, and actually aided the officers. The officers' search uncovered three checks under the left rear seat.

This is not a case where a party consented to a search knowing that it was likely to disclose evidence which would incriminate him. Alcala, not Bustamonte, consented to the search. As Alcala was in the front seat he could hardly know that his companions were hiding checks under the rear seat. There is no basis here for a presumption of coercion on the theory that "no sane man who denies his guilt would actually be willing that policemen search . . . for contraband which is certain to be discovered." *Higgins v. United States,* 209 F.2d 819, 820 (D.C. Cir. 1954);[3] *cf. Coolidge v. New Hampshire, supra.*

The early hour cannot be considered a coercive factor. *Cf. People v. Kennedy,* 256 Cal.App.2d 755, 64 Cal.Rptr. 345 (1967) (2:00 a.m.). The road where the stop was effected was peopled with twice as many suspects as officers. Since Bustamonte and his friends outnumbered the police six to three, the number of officers could hardly be coercive. The occupants of the Ford were not "questioned" regarding any crime, but merely asked to furnish a driver's license or identification. The traffic citation was issued to Gonzales, not Alcala.

Here there was no "dramatic excitement of drawn guns," or arrest preceding consent. *Wren v. United States,* 352 F.2d 617, 619 (10th Cir. 1965). "The circumstances of the investigation by the police presents

[3]This line of reasoning seems to have led federal courts to distrust and disfavor consensual searches. However, "one may question a logic which fails to consider that aspect of human nature which leads one person to believe he may bluff or beguile another." *People v. Linke,* 265 Cal.App.2d 297, 306, 71 Cal.Rptr. 371, 376 (1968).

[sic] a calm, routine performance of duty by the officers. There is no evidence of any threats on the part of the officers or the use of any other means from which duress or coercion could be inferred." *Id.* at 620.

Alcala's expression of consent was specific, unequivocal, and affirmative. It was more than assent, it was an invitation. The atmosphere was not coercive but "congenial." *People v. Bustamonte,* 270 Cal.App.2d 648, at 652, 76 Cal.Rptr. at 20 (1969). Alcala's subsequent assistance during the search confirms the voluntary nature of his consent.[4]

Granting the validity of California's consent rule, there can be no question but that the state trial and appellate courts can correctly conclude that Alcala was not overawed by the badge and that his consent was free and voluntary. The Ninth Circuit appears to concede as much. The Ninth Circuit was obliged under Title 28, United States Code section 2254(d) and *Ker v. California, supra,* to respect that finding.

Finally, the decision below must be overturned because of the palpable injustice of imposing on California a waiver standard inconsistent with the more liberal approach the Ninth Circuit has taken in reviewing federal convictions. See *United States v. Novick, supra; United States v. Wilson, supra; United States v. Noa, supra.*

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[4]Gonzales testified that Alcala opened the trunk. Appendix p. 52.

II

THIS COURT SHOULD HOLD THAT CLAIMS BASED ON THE EXCLUSIONARY RULE SHOULD NOT BE AVAILABLE TO STATE PRISONERS SEEKING TO SET ASIDE THEIR CONVICTIONS ON FEDERAL HABEAS CORPUS.

In our petition for certiorari in this case, we requested the Court to reexamine *Kaufman v. United States,* 394 U.S. 217 (1969), as well as those decisions in which the Court has applied the exclusionary rule in state habeas corpus cases. *Whitely v. Warden,* 401 U.S. 560 (1971); *Harris v. Nelson,* 394 U.S. 286 (1969); *Mancusi v. DeForte,* 392 U.S. 364 (1968); *Carafas v. LaVallee,* 391 U.S. 234 (1968); *Warden v. Hayden,* 387 U.S. 294 (1967). This Court has accepted that invitation. We now request that these cases be overruled.

The essence of our position is that the advantages of applying the exclusionary rule on collateral attack of state convictions are upon analysis illusory, and the disadvantages in persisting in that practice are in fact overwhelming. We ask the Court to adopt here a balancing test comparable to that used in *Harris v. New York,* 401 U.S. 222 (1971). In that case, which involved the admissibility for purposes of impeachment of a statement taken in violation of the *Miranda* rule, the Court weighed the deterrent effect of total exclusion of the impeaching evidence, against the compelling policy in favor of admission of such evidence as an aid to the truth-determining process, the very purpose of a criminal trial:

> "The impeachment process here undoubtedly provided valuable aid to the jury in assessing

petitioner's credibility and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby. Assuming that the exclusionary rule has a deterrent effect on prescribed police conduct, sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Id.* at 225.

The same approach should be applied to the question of whether Fourth Amendment claims should be considered on federal habeas corpus. Taking first the deterrent side of the balance, one must ask whether the availability of federal collateral attack to review the merits of state search and seizure questions adds substantially to the deterrent effect of the exclusionary rule. Prestigious authorities have said it does not. Former California Chief Justice Roger Traynor put the matter thusly:

"The purpose of the exclusionary rule is not to prevent the conviction of the innocent, but to deter unconstitutional methods of law enforcement. [Citations.] That purpose is adequately served when a state provides an orderly procedure for raising the question of illegally obtained evidence at or before trial and on appeal. The risk that the deterrent effect of the rule will be compromised by an occasional erroneous decision refusing to apply it is far outweighed by the disruption of the orderly administration of justice that would ensue if the issue could be relitigated over and over again on collateral attack." *In re Sterling,* 63 Cal.2d 486, 487-488, 47 Cal. Rptr. 205,

207, 407 P.2d 5, 7 (1965), quoting *In re Harris,* 56 Cal.2d 879, 883-884, 16 Cal.Rptr. 889, 892, 366 P.2d 305, 308 (1961). *See also,* Amsterdam, *Search, Seizure and Section 2255,* 112 U. PA. L. REV. 378, 389-390 (1964).

Moreover, since the decision in *Kaufman,* considerable research has been conducted into the actual deterrent effect of the exclusionary rule. D. Oakes, *Studying the Exclusionary Rule in Search and Seizure,* 37 U. CHI. L. REV. 665 (1970). At the conclusion of his article, Professor Oakes states in part as follows:

> "As a device for directly deterring illegal searches and seizures by the police, the exclusionary rule is a failure. There is no reason to expect the rule to have any direct effect on the overwhelming majority of police conduct that is not meant to result in prosecutions, and there is hardly any evidence that the rule exerts any deterrent effect on the small fraction of law enforcement activity that is aimed at prosecution. What is known about the deterrent effect of sanctions suggests that the exclusionary rule operates under conditions that are extremely unfavorable for deterring the police. The harshest criticism of the rule is that it is ineffective. It is the sole means of enforcing the essential guarantees of freedom from unreasonable arrests and searches and seizures by law enforcement officers, and it is a failure in that vital task." *Id.* at 755.

If, as Professor Oakes concludes, the deterrent effect of the exclusionary rule as applied by state trial courts is at best speculative, what then can be said about its

application by the federal courts to review state decisions long since final? About the only justification that can be advanced for such a practice was that stated by the five-man majority in *Kaufman v. United States, supra,* as follows: "The availability of post-conviction relief serves significantly to secure the integrity of proceedings at or before trial and on appeal. . . . Collateral relief, unlike retroactive relief, contributes to the present vitality of all constitutional rights whether or not they bear on the integrity of the fact-finding process." *Id.* at 229.

However, we respectfully submit that this argument misses the point; the integrity of the judicial process is preserved by those decisions of this Court which have guaranteed every state criminal defendant adequate process for both the litigation at trial and review on appeal of federal questions in the state courts.

State criminal defendants are now entitled to counsel at trial, *Gideon v. Wainwright,* 372 U.S. 335 (1963); confrontation of witnesses, *Pointer v. Texas,* 380 U.S. 400 (1965); definitive rulings by trial judges on objections to the admissibility of confessions, *Jackson v. Denno,* 378 U.S. 368 (1964); *Sims v. Georgia,* 385 U.S. 538 (1967); and, where the state provides appellate review in criminal cases, the right to a free transcript of the trial proceedings or its equivalent for review on appeal, *Griffin v. Illinois,* 351 U.S. 12 (1956); *Draper v. Washington,* 372 U.S. 487 (1963); and the right to counsel on appeal, *Douglas v. California,* 372 U.S. 353 (1963), serving in the capacity of an advocate, *Anders v. California,* 386 U.S. 738

(1967). The requirements that have been imposed by this Court guarantee procedures in the state courts which are calculated to reach a just resolution of any any material issue a defendant may seek to raise. The integrity of state court procedures is best served by guaranteeing procedural fairness, rather than the constant litigation and relitigation of the merits of factual issues years after the events in question.

The only way in which the *Kaufman* rule can be justified is if the interest of the states in maintaining the finality of criminal judgments is totally disregarded. However, the public interest in the finality of criminal convictions is substantial. *McMann v. Richardson,* 397 U.S. 759, 774 (1970). Never has the imperative of finality in the administration of criminal justice been better explained that it was by Professor Paul M. Bator in his definitive article, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners,* 76 HARV. L. REV. 441 (1963). Professor Bator there pointed out the many undesirable results of undermining the finality of criminal judgments by allowing the relitigation of contested factual issues. Such relitigation undermines public confidence in the administration of criminal justice, tends to demoralize state trial and appellate judges, and saps the criminal law of its deterrent effect by clouding the certainty of punishment even after a judgment has been affirmed on appeal. Moreover it is totally at odds with any idea of rehabilitating criminal offenders. In Professor Bator's words, "the idea of just condemnation lies at the heart of the criminal law, and we should

not lightly create processes which implicitly belie its possibility." *Id.* at 452.

Moreover, the disadvantages of relitigating the merits of Fourth Amendment claims on federal habeas corpus are compounded by reason of the fact that questions pertaining to search and seizure are among the most difficult and complex to be encountered in the criminal law. *See Coolidge v. New Hampshire,* 403 U.S. 443 (1971). Because of this complexity and uncertainty decisions on these issues are unpredictable. This unpredictability increases the possibility that a persistant litigant, such as Bustamonte, will eventually find a judge who agrees with his view of the exclusionary rule. Bustamonte had failed to persuade one state trial judge, ten state appellate judges, and one United States District Court judge before a three-judge panel of the Ninth Circuit agreed with his position. Clearly, in these days of crowded court dockets adherence to *Kaufman* retains "a burden on the judiciary and on society at large, which results in no legitimate benefit to the [habeas] petitioner and does nothing to serve the interest of justice." *Kaufman v. United States, supra,* 394 U.S. at 243 (dissenting opinion of Mr. Justice Harlan).

CONCLUSION

Petitioner respectfully requests this Court to remand the case to the Ninth Circuit Court of Appeals with directions to vacate its opinion and to affirm the order of the District Court denying Bustamonte's petition for the writ of habeas corpus.

Dated, April 17, 1972.

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